

## ***9 Official Opinions of the Compliance Board 40 (2013)***

- ◆ **Meeting** – *Determined to be a meeting:*
  - ◇ interaction of a quorum on public business
- ◆ **Notice Requirements** – *Method – Generally*
  - ◇ notice to be given to the general public

\*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

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August 16, 2013

Re: Frederick County Board of County Commissioners  
*Catherine Forrence and Kimberly Melon (Complainants)*

We have considered the allegations of Catherine Forrence and Kimberly Mellon (the “Complainants”) that the Frederick Board of County Commissioners (the “County Board”) violated the Open Meetings Act (the “Act”) when, on June 15, 2013, two members of the five-member County Board appeared on a local radio broadcast to participate in an on-air discussion about the proposed sale of certain County-owned facilities and then were joined by a third commissioner for approximately seven minutes. The questions posed by the complaints are whether the seven-minute discussion of public business by a quorum of the County Board was subject to the Act, and, if so, whether the County Board complied with the Act’s requirements that a public body give public notice of its meetings and keep minutes.

### **Background**

On June 15, 2013, two members of the five-member County Board appeared as in-studio invited guests on AM 930 WFMD’s “Frederick’s Forum with Pattee Brown.” As the radio station had apparently advertised to its listeners, the topic of the radio show was the proposed sale of two County-owned facilities, a matter that the County Board had discussed in various public meetings throughout the year and was to decide at a public hearing on June 25. During the broadcast, the host invited members of the public and other interested parties to call in and participate. During the first hour, the host announced that a third commissioner was on hold, waiting to join the discussion. In the second hour, the host took that commissioner’s call, and he then joined the discussion for about seven minutes. The radio station posted the entire broadcast on its Web site two days later. Neither

the event nor the broadcast was posted on the County's website. On June 25, the County Board voted on the proposed sale of the facilities.

The first complaint alleges that the Act was violated because "only those listening to the show would have access to the information disclosed by the quorum of the public body." The second complaint alleges that a quorum of the County Board convened to discuss an issue of public interest without providing notice of the meeting, preparing minutes, or providing access to the public. In its response, the County Board points out that "[t]he radio station advertised the show and its guests" and that "[a]nyone with access to a radio or the internet could listen to the program." Citing § 10-503(a)(2) of the State Government Article ("SG"), which excludes from the Act a "chance encounter, social gathering, or other occasion that is not intended to circumvent [the Act]," the County Board asserts that the event was an "other occasion not intended to circumvent the Act" because the "very purpose of the radio show appearance was an open and public effort to inform the citizens." The County Board further asserts that the event was not a "meeting" as defined by the Act because the members had not convened "for the consideration or transaction of public business," *see* SG § 10-502(g), and did not hold a meeting "to deliberate and decide" the proposed sale.

### **Discussion**

As relevant here, the Act applies when a public body "meets." *See* SG § 10-505. As defined by the Act, to "meet" is "to convene a quorum of a public body for the consideration or transaction of public business." SG § 10-502(g). The Act does not apply to a "chance encounter, social gathering, or other occasion that is not intended to circumvent [the Act]." The threshold question here is whether the radio show, once joined by a quorum of the County Board,<sup>1</sup> was a "meeting" of the County Board, or instead an "other occasion that [was] not intended to circumvent the Act."<sup>2</sup>

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<sup>1</sup> The fact that the third commissioner participated by telephone from a location outside of the radio studio is immaterial to the question of whether he was "present" for purposes of the Act, at least for the time during which he was able to communicate with the other two commissioners. *See Tuzeer v. Yim, LLC*, 201 Md. App. 443, 469 (2011) (holding that a member of a public body who participated by speakerphone was one of the members "convened" for purposes of the Open Meetings Act).

<sup>2</sup> The Act also does not apply to entities that are not public bodies or to meetings at which a public body only performs one of the functions expressly excluded from the Act, *i.e.*, the administrative, judicial, and quasi-judicial functions. SG § 10-505, 10-503. The County Board is unquestionably a "public body" subject to the Act, and it properly has not claimed that the discussion of the impending legislative proposal to sell the facilities and abolish a county-created board of directors fell within one of the excluded functions.

The Maryland appellate courts have addressed the question of when the attendance of a quorum of a public body's quorum at another entity's event causes that event to become a "meeting" of the public body itself, rather than simply an "occasion not intended to circumvent the act." See *City of New Carrollton v. Rogers*, 287 Md. 56 (1980); *Ajamian v. Montgomery County*, 99 Md. App. 665 (1994). As we have understood those cases, our inquiry should focus on whether the event involved the business of the hosting entity, as distinct from the public body's own business, and whether the members of the public body used the occasion to interact on its own public business. See, e.g., 7 *OMCB Opinions* 105, 109-110 (2009); 1 *OMCB Opinions* 120 (1995). In *Rogers*, a neighborhood association for an area that had been proposed for annexation to the City of New Carrollton held a meeting about the proposal and invited the city council members to attend "for the purpose of answering questions that the residents might have about New Carrollton." 287 Md. at 71. The Court concluded that the event was not a meeting of the city council and that it fell within the Act's exclusion for a "chance encounter, social occasion, or other occasion that is not intended to evade the Act." Although the Court did not state its reasoning, the case also involved workshops that had been convened by the city council to discuss the proposal and that the Court had held to be subject to the Act. The facts that distinguished the association's meeting from the council's workshops thus were that the council members had not convened the neighborhood association meeting and had been invited to discuss the city generally, not the annexation proposal.

In *Ajamian*, a political party's county central committee held a meeting to discuss a variety of topics, including a redistricting plan currently before the county council. Forty to fifty people attended; so did a quorum of the county council members. The council president summarized the plan for the group. Otherwise, the council members neither joined the committee's discussion of the plan nor participated in the vote. 99 Md. App. at 676. The court noted the trial court's finding that "[t]here was no evidence that any County Council members spoke to any other County Council member" and "no evidence any County Council member took a position that would have been known by anyone there, much less one of the other County Council members." *Id.* at 677. The court found that the event was not a "meeting" of the county council.

Here, it would be hard to conclude either that the radio station assembled the guests to discuss business distinct from the public business of the County or that the commissioners did not interact. Indeed, the guests had no agenda other than to discuss the issue on which the County Board would act ten days later, and their role was to interact among themselves, the host, and the people who called in. In short, the two commissioners who were scheduled to appear as guests had convened to discuss public

business, and they continued to do so when the third commissioner's appearance by telephone created a quorum.

That brings us to the County Board's argument that the event was not subject to the Act because it was not "intended to circumvent the Act." We have not read the exclusion provided by SG § 10-503(a)(2) so broadly as to exempt from the Act every discussion of public business that arises in a setting that was unplanned by the public body itself. In these so-called "accidental quorum" matters, we have instead looked to whether the occasion has devolved into a stage of deliberation, on public business, in the presence of a quorum. In 3 *OMCB Opinions* 30, 34 (2000), for example, we found that a briefing for the county council's officers on a budget became a "meeting" subject to the Act when an additional council member arrived and created a quorum. The fact that the presence of a quorum of members was unplanned, we said, "does not excuse compliance with the Act." Describing that council's initially-inadvertent meeting as a "failure of awareness" on the part of the members, we advised that "members of a public body have a duty to be especially sensitive to Open Meetings Act issues when, as here, a quorum is together, the setting is manifestly not a social one, and the topic bears directly on a pending matter." Likewise, in 6 *OMCB Opinions* 155, 159 (2009), where a quorum of the public body attended the meeting of an informal group merely "to observe" and provided "minimal input, if any," we advised, "[o]nce a quorum was present, discussion should have ended to avoid triggering [the Act]." That same advice holds true here, as does the result: the County Board violated the Act when several of its members interacted on a pending issue without having given notice of a meeting through the County Board's usual methods.

### **Conclusion**

Although the three County Board members who participated in the radio broadcast clearly did not intend to conceal their discussion, the general public—not merely the radio station's usual audience—was entitled to reasonable advance notice that a quorum of the County Board would discuss the legislative business then pending before it. The County Board did not provide that notice and therefore violated the Act when the third commissioner joined the discussion. We do not address the alleged failure to keep minutes, as we have no information from which to assess whether they would be untimely as of the date of our consideration of this matter.

Open Meetings Compliance Board

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